APPELLATE PRACTICE SECTION

STATE BAR OF MICHIGAN

August 28, 2003

Michigan Supreme Court
Clerk's Office
Michigan Hall of Justice
925 W. Ottawa, 4th Floor
Lansing, MI 48915

Re: File No. 2002-34; Proposed amendments to MCR 7.204, 7.210 and 7.212

Dear Madame Chief Justice and Associate Justices:

On November 4, 2002, I sent Chief Justice Corrigan a copy of the Appellate Practice Section's Report on the Court of Appeals' Delay Reduction Plan and Proposed Court Rule Amendments. The Section's Council unanimously approved and adopted the Report by an 18-0 vote at its October 18, 2002 meeting.

As articulated in the enclosed Report, the Appellate Practice Section supports the proposed amendments to MCR 7.204(H) and MCR 7.210(B) and (G). We oppose, however, the proposed amendments to MCR 7.212 that will cut briefing time, eliminate stipulated extensions and substantially restrict the good cause standard for extensions by motion. The Section's report emphasizes that the proposed cuts in briefing time and restrictions on extensions will detrimentally affect the practices of Michigan's appellate lawyers, particularly appellate specialists, and will undermine the quality of both briefs and the decision-making process.

As of November, 2002, this was the position of the Appellate Practice Section only. The State Bar had not yet adopted a position on this matter.

On March 11, 2003, the Supreme Court published for comment the Court of Appeals' proposed delay reduction rule amendments. Before the initial comment period ended, representatives of the State Bar and Chief Judge Whitbeck agreed to form the Appellate Delay Reduction Intake Management Task Force Committee (Delay Reduction Committee). After this ad hoc committee was created, the Supreme Court extended the comment period for the proposed delay reduction amendments to September 1, 2003.

Over the summer, the Delay Reduction Committee has explored alternatives to reduce the Court of Appeals' intake delay. After retaining experienced consultants, State Bar members of the Delay Reduction Committee have analyzed the Court of Appeals' recent case statistics. Among other things, these statistics show that, if the warehouse is eliminated, and with no intake court rule amendments, the Court of Appeals will be disposing of 88.9 percent of all its cases within 18 months. This is quite close to the Court's delay reduction goal of 95 percent case disposition.

In addition, early on, the Delay Reduction Committee recognized that transcript and lower court record production present several delay reduction issues. Statistical analysis shows that, in approximately 30 percent of cases, lower courts took longer than the currently allotted 21 days to transmit the record. Even more, in 50 percent of the cases decided more than 18 months after filing, transcripts are produced well past the 91-day deadline.

Accordingly, earlier this month, Chief Justice Corrigan and Chief Judge Whitbeck jointly established the Record Production Work Group (the Work Group). Among other tasks, the Chief Justice and Chief Judge asked the Work Group to determine the average Court of Appeals intake time consumed by both transcript and record production over the past three years. They also requested recommendations for how transcript/record production time can be reduced. The first meeting of the Work Group will be held on September 3, 2003.

Efforts of the Delay Reduction Committee and formation of the Work Group only underscore the fact that the proposed reductions in briefing time are premature and potentially unnecessary. Before we understand the impact of transcript and record production on delay, it makes no sense to jump ahead and cut briefing time. This is especially true because the Court of Appeals does not project eliminating the warehouse until September, 2004. The Bench and Bar have just begun evaluating the full spectrum of intake delay. We have already learned that elimination of the warehouse alone nearly reaches the Court of Appeals' 95% goal. The Work Group may determine that reasonable transcript and record production reforms will complete the task.

Though the Delay Reduction Committee continues its analysis and the Work Group is just starting, the comment period for the proposed delay reduction court rule amendments expires on September 1, 2003. Moreover, these proposed amendments are on the Supreme Court's September 25, 2003 open meeting agenda.

By unanimous Council vote of 15-0 on August 14, 2003, the Appellate Practice Section asks the Supreme Court to extend the comment period and remove the delay reduction amendments from the September 25, 2003 open meeting agenda. Pending recommendations of the Delay Reduction Committee and Work Group, by unanimous Council resolutions on April 23, 2003 (a 14-0 vote) and August 14, 2003 (a 15-0 vote), the Appellate Practice Section maintains its positions on the delay reduction court rule amendments set forth in the attached Report (see enclosure). We continue to support the proposed amendments to MCR 7.204 and 7.210 and to oppose the proposed amendments to MCR 7.212. The Appellate Practice Section currently has 681 members.

The Appellate Practice Section's position is consistent with that of the State Bar of Michigan. On April 25, 2003, the State Bar's Board of Commissioners voted to

1. Support generally the ongoing efforts of the Court of Appeals to reduce appellate delay.

2. Support funding for appellate delay reduction initiatives to reduce the "warehouse."

3. Oppose the published revisions to MCR 7.212 that eliminate stipulated extensions of time to file briefs and shorten the time for filing briefs and reply briefs.

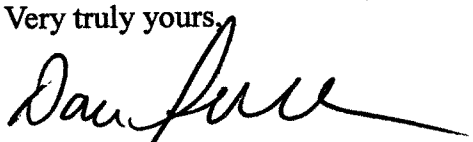
4. Recommend further study, and urge attention to the Report of the State Bar of Michigan Task Force on Appellate Delay Reduction.

Since the Section issued its Report on the Court of Appeals' Delay Reduction Plan and Proposed Court Rule Amendments last November, no one has effectively allayed our conclusion that the proposed amendments to MCR 7.212 will hurt Michigan's appellate lawyers and erode the quality of both briefs and the decision-making process. The Section also has not heard any persuasive argument that, if the warehouse is eliminated[1] and reasonable transcript and record production reforms are implemented, the need for further delay reduction justifies these negative consequences.

The Appellate Practice Section remains committed to working with the Court of Appeals on the systemic delay reduction issues. During the past year, the Section actively supported the Supreme Court and Court of Appeals' budget requests and proposed fee increases. The Section believes that reasonable solutions to intake delay can be found. We ask that the Supreme Court give the Bench and Bar time to do so.

Thank you for your consideration.

Very truly yours,



Donald M. Fulkerson
Chair, Appellate Practice Section

Enclosure

cc: Hon. Maura D. Corrigan, Chief Justice, Supreme Court
Hon. William C. Whitbeck, Chief Judge, Court of Appeals
John T. Berry, Executive Director, State Bar of Michigan

[1] As of the Court of Appeals' April 10, 2003 Progress Report No. 4, the average warehouse time was still 234 days.

THE APPELLATE PRACTICE SECTION'S REPORT ON THE COURT OF APPEALS' DELAY REDUCTION PLAN AND PROPOSED COURT RULE AMENDMENTS

Introduction

The Appellate Practice Section, State Bar of Michigan, is comprised of more than 700 lawyers whose goal is "to advance the administration of justice in the appellate courts so that the Bench and Bar may better serve the public interest" (Bylaws, §1.2). Included among the Section's activities is the development and recommendation of "policies and procedures to advance the productive and competent operation of the appellate courts."

In April of 2002, Chief Judge William Whitbeck presented to the Section's Council the Court of Appeals' proposed plan to reduce delay in that Court's decision making process. In July of 2002, the Court of Appeals submitted a package of proposed court rule amendments to the Michigan Supreme Court designed to implement the delay reduction plan.

The Appellate Practice Section has studied the plan and the proposed court rule amendments in detail and has prepared this report. While the Section strongly supports the Court's efforts to reduce the amount of time required to decide cases, and supports the proposed amendments to MCR 7.204 and MCR 7.210, the Section believes that the proposed amendments to MCR 7.212 will negatively impact the quality of the decision making process without contributing to more timely decisions. The Section will make every effort to work with the Court on implementing a plan that will reduce delay and, at the same time, preserve the integrity of the appellate process in this state.

MCR 7.204(H)

The Section supports the proposed amendment to MCR 7.204(H). There is no reason why docketing statements in civil cases should not be filed in 14 days rather than 28. A few defective appeals may be identified and dismissed earlier, and a few appeals may settle a little earlier.

MCR 7.210(B) and (G)

The Section supports the proposed amendments to MCR 7.210 (B) and (G), but has reservations about whether they will, in fact, shorten the time for deciding appeals. These changes may reduce "intake" time in some appeals, but only by shifting the time to the "warehouse." As for (B), many reporters already file summary disposition transcripts in fewer than 91 days, so the practical effect of this change may be minimal. The phrase "only that portion of the transcript concerning the order appealed from" is potentially ambiguous, but the ambiguity seems unlikely to have important effects. As for (G), if achievable, there is no harm in transmitting the record 14 days after the brief of appellee is due, even though the optional reply brief will not yet be due under the present rules. Because the reply brief is optional and record transmittal is ministerial, the Section recommends that the Court deem appeals to have entered the warehouse on the day after the brief of appellee is due or filed, whichever comes earlier.

MCR 7.212

MCR 7.212, as all appellate practitioners know, is the rule that determines when the parties' briefs are due and what goes into them. Most of the time, appeals are won or lost based on the contents of the briefs. The briefs distill everything that happened in the lower court, determine what the issues will be on appeal, and advocate the outcome the party wants by explaining how the law applies to the facts. Preparing the briefs of the parties is the single most time consuming and labor-intensive stage of an appeal. Under current practice (including extensions routinely available under written guidelines), the Court of Appeals will allow the appealing party up to 112 days to file the brief of appellant. The opposing party is allowed up to 91 days to file the brief of appellee. These are the main briefs, although the appellant has another 21 days to file an optional short reply to the brief of appellee. The proposed amendments to MCR 7.212 would reduce the time available for the parties' main briefs from 203 days to 77 days in most cases. It would also reduce the time available for the optional reply brief from 21 to 14 days.

The Warehouse

To put this in context, the Court of Appeals reports that in 2001, the overall average duration for appeals decided by opinion was 654 days, more than three times the 203 days allowed for principal briefs. The culprit is not the judges or research

staff of the Court of Appeals, who do their job, on average, in about four months. The culprit is the Court's backlog, referred to in the Court's current discussions as the "warehouse." This label describes the place where appeals that have been briefed sit idle, waiting behind older briefed appeals for their turn to be worked on by the Court's research staff and judges. In 2001, appeals destined to be decided by opinion spent, on average, 266 days in the warehouse.[1] This means that no progress of any kind is made in the average appeal for almost nine months after the lawyers complete the lion's share of their work and before the Court begins its work.

Amending MCR 7.212 Would Not Shorten Appeal Duration

The goal of the Court of Appeals' program is to dispose of 95 percent of its cases within 18 months of filing. If the warehouse were eliminated, so that the Court's staff began working on appeals as soon as the briefs were completed, this alone would accomplish the Court's goal. Even a substantial reduction in the size of the warehouse might accomplish the Court's goal. But as long as the warehouse exists at all (*i.e.*, as long as the Court's backlog makes it necessary for briefed appeals to sit idle before the Court is able to work on them), shortening the time allowed for briefing will not shorten appeal duration. Instead, the rate at which appeals enter the warehouse will increase, tending to offset any production gains at the "output" end, leaving the backlog intact. Because the proposed amendments would reduce briefing periods by more time than could foreseeably be gained at the "output" end, it appears that the warehouse would actually expand.

The Court of Appeals reports that it has been able to make gains at the "output" end, even though it remains short-staffed in its research division. In 2001, the average processing time for all cases decided by opinion was 125 days (61 days for case preparation by staff and 64 days for opinion writing by the 28 judges of the Court of Appeals). For the first six months of 2002, the average processing time was reduced to 117 days (73 days for case preparation and 44 days for opinion writing).[2]

---

[1]This overall average includes expedited appeals, such as custody cases. The overall average warehouse time for non-expedited appeals in 2001 was 330 days, or about 11 months.

[2]These statistics come from Progress Report No. 1, issued August 15, 2002, by the Court of Appeals Delay Reduction Work Group. The same report shows an overall 13-day drop in "intake" time (the period in which briefs are written) for 2002, as compared to 2001, even without any rule changes. All time periods were down, except for "research" which increased.

This 8-day reduction, however, pales when compared to the number of days by which the Court proposes to reduce briefing time. Even if the Court could reduce time at the "output" end a little more, quality decision-making is inherently a time-consuming process that imposes real limits on the potential gains to be had. Moreover, as the Section discusses below, drastic cuts in briefing time are likely to degrade the overall quality of the briefs filed, which in turn could be expected to increase the staff and judicial time needed at the "output" end of the process. Good briefs facilitate good decision-making, for obvious reasons. The opposite is equally true.

The Section congratulates the Court on increasing its overall production. Gains of this kind in the "output" end can contribute directly to an actual shortening of appeal duration. Moving a block of time from the briefing stage to the warehouse stage, however, is at best simply a relabeling of the same time, with no shortening of appeal duration. We say "at best," because in practice a significant reduction in available briefing time would not merely fail of its purpose. It would also have a number of adverse effects on the litigants, their counsel, and the overall appellate process.

Amending MCR 7.212 Would Adversely Affect the Appellate Process

The proposed amendments to MCR 7.212 would reduce the available time for preparing appellant's brief from 112 days to 42 days in most cases. The rule reduces the base time for the appellant's brief from 56 to 42 days, eliminates entirely the current provision allowing each party a single 28-day stipulated extension, and eliminates extensions by motion except "for good cause shown." Under current practice, governed by the Court's internal operating procedures, judges do not ordinarily devote time to determining whether there is "good cause" for an extension motion. The Court has a standard practice of granting one 28-day extension by motion (in addition to the 28-day stipulated extension), without substantive analysis of the reason given or the request. Normally the Court does not grant additional extension requests, once a party has used up the 56 days permitted by the internal operating procedures. Very limited exceptions are made for good cause shown. As the committee understands the proposed amendment, there would no longer be any routinely available extension time, and all requests would be subject to the "good cause" standards applied

by the chief judge or his designee.[3]

The proposed amendments also would reduce the time for reply briefs from 21 to 14 days. This period runs from the date of mailing, so appellants would routinely have between 11 and 13 days to study the brief of appellee and prepare a response. No stipulated extensions are available for reply briefs, which are "optional". The Court deems an appeal to be ready for submission as of the due date of the brief of appellee (whether or not it has been filed). Reducing the already short time for reply briefs will not shorten overall appeal duration at all. The only effect will be to make it more difficult for appellants to prepare good reply briefs.

It is impossible to know exactly what percentage of current average briefing time would be eliminated by the proposed amendments to MCR 7.212. This is because there are no statistics for briefing alone. The Court's statistics include briefing in the "intake" stage, along with transcript production and record transmittal from the trial court. In many appeals, no extensions are requested. In some cases, the briefs are filed before they are due. In others, the brief of appellant may be filed after it is due.[4] Variables like these, along with transcript variables, reduce the utility of the Court's "intake" statistics as a guide to current average briefing time. It is clear, however, that a large majority of the proposed reduction in "intake" time is anticipated to come from reduced briefing time. It is also clear that the stated goal of a 33 percent reduction in "intake" time would represent an even larger reduction in briefing time-more on the order of 50 percent.

The Council believes that a reduction in average briefing time on the order of 50 percent would be deleterious for all concerned - the litigants, their counsel, and the Court itself. At the outset of an Appeal, the record is essentially one or more boxes of pleadings and other papers filed in the trial court, a set of hearing and trial transcripts, and evidentiary

[3]Under MCR 7.211(E)(2)(b), an extension motion is an "administrative motion" that does not go to a panel of three judges, but is decided by the chief judge alone or by his designee. Chief Judge Whitbeck, on various occasions in recent months, has discussed what he believes to be "good cause" for an extension. Based on those comments, the Section is working on the assumption that extensions would not be routinely available, and that they would be very limited in length when granted at all.

[4]Again, it is irrelevant when the brief of appellee is actually filed, since the appeal takes its place in line in the warehouse based on the due date of the appellee's brief.

exhibits that may number only a few or more than a hundred. First the appellant's lawyer, and then the appellee's, must distill this volume of raw material down to a few key issues, write a narrative account of the proceedings below (supporting every factual assertion with a reference to evidence in the record), explain how the law applies to the facts, and, if necessary, place the legal issues in its larger context so that the Court can understand the broader implications of the decision it is being asked to make. Good appeal briefs can take hundreds of hours to produce, especially if the case presents complicated facts or thorny legal issues. Large "box" appeals, which may involve whole teams of lawyers who must exchange drafts, confer, and reach consensus on issues and arguments, are also very time-consuming. Even in simple cases, the task is time-consuming. All this is hard enough for the appellate lawyer who was present at trial, but is even more time-consuming for the lawyer new to the case. In criminal appeals (a large portion of the Court's workload), the appellate lawyer is typically new to the case.

If the appellate lawyer cannot complete his or her brief by the due date, one of three things is likely to happen. The lawyer may file an inadequate brief (creating hardships for the client and the Court), the lawyer may file a late brief, or the lawyer may file no brief. The sanction for filing a late brief in the Court of Appeals is loss of oral argument. Late briefs are not uncommon now, an indicator that current time periods are not overly generous. If a party's lawyer is not present when the case is submitted to a panel for decision, that means the panel cannot ask any questions it may have concerning that party's position. The exchange of questions and answers is a chief purpose of oral argument, and can be very helpful to the Court. If an appellant files no brief, the appeal will eventually be dismissed, after having wasted the time of all concerned. If an appellee files no brief, the Court is left with only the lower court's opinion to counter the appellant's arguments. None of these alternatives is good.

Extensions by stipulation and by motion are a means to avoid the filing of inadequate briefs or late briefs (not to mention dismissed appeals). They are the only real scheduling tool an appellate lawyer has. Unlike trial lawyers, who have a toolbox full of scheduling devices, appellate lawyers are largely at the mercy of fixed deadlines that derive from events over which they have no control. The appellant's lawyer cannot control when the transcript is filed (the event that normally starts the brief period running). The appellee's lawyer cannot control when the appellant will file the brief that starts the

appellee's time running. When applications for leave to appeal and motions are filed, the time for responses is rigidly enforced. Some dates are jurisdictional and absolute. While some appellate lawyers seldom use extensions, others use them routinely. But either way, extensions are a crucial tool for almost every appellate practitioner.

The Court's Current Extension Practices Work Well

Appellate lawyers, like people everywhere, have to deal with illness, accidents, emergencies, the needs of family members, and all the unexpected contingencies of life. Without the safety-valve of an available 28-day extension, many appellate lawyers, particularly sole practitioners, would inevitably be unable to juggle their pending case load so that every brief was timely filed. Extension motions would be filed that required judicial time to resolve factual allegations about scheduling problems (a collateral issue that the Court can ill-afford to spend time on). Briefs would be filed to meet deadlines even though they were incompletely thought-out and developed (again requiring additional judicial time). Alternatively, briefs would be filed late (which either deprives the Court of a potentially useful oral argument or requires judicial time to resolve a last-minute motion requesting permission to argue) or not at all. When the appellant fails to file a brief, the appeal is ultimately dismissed (although this often results in yet another motion, in this case to reinstate the appeal). When the appellee fails to file a brief, the Court must then decide for itself whether the lower court's decision should be affirmed.

Under current practice, the Court of Appeals is able to minimize collateral motions on messy scheduling issues. Lawyers can read the Court's internal operating procedures and understand that one stipulated extension and one extension by motion are permitted to each side. This affords the lawyers just enough scheduling control to give their cases the solid blocks of time needed to prepare good, useful appellate briefs, with a safety valve for unexpected events and true emergencies. Court staff and judges can devote their attention to the merits of cases. By and large, they need not devote precious time to messy questions of fact that they are in no real position to decide and that, in any event, are unrelated to the merits of the cases themselves. The Court's current extension practices are the product of decades of experience and refinements. They are conducive to quality brief writing, which benefits the litigants and the Court itself. In light of the warehouse, they do not cause any "delay" at all. Appeals would take just as

long to be decided even if there were no extensions. Even if the warehouse did not exist (an extremely hypothetical situation, since there is no prospect of complete elimination in the current budget climate), the portion of total appeal time spent on briefing would not be excessive. Briefing is the crucial stage where the appeal is shaped and formed. In a great many appeals, the appellant's lawyer is new to the case and starts from scratch. In almost every appeal, the appellee's lawyer can do very little until the brief of appellant is received and the appellate issues become known.

Many of the same reasons that counsel against eliminating current extension practices apply equally to the proposal to reduce the appellant's base time from 56 to 42 days. The proposed reduction will not shorten appeal duration at all. It will only make extension requests more commonly necessary, not less. Appellants need more briefing time than appellees, and the three extra weeks provided in the current rule is a rational period of time. If extensions became less readily available than they currently are, the base time for briefs should be lengthened, not shortened. As noted earlier, the proposed reduction of reply brief time from 21 days to 14 days also is a bad idea. The 14-day period typically will be a shorter period in fact, because the brief of appellee normally is mailed, not hand-delivered. That is too short a time, particularly since shortening the time accomplishes nothing.

Conclusion

Although the Section opposes the proposed changes to MCR 7.212, it supports the proposed amendments to MCR 7.204(H) and MCR 7.210(B) and (G) and it strongly supports the goals that motivated the Delay Reduction Plan. Appellate lawyers should make every effort to process appeals as quickly as possible, consistent with the needs of their clients and the goal of correctly decided appeals that serve the interests of justice. The Section looks forward to working with the Court of Appeals and the Supreme Court toward those ends.